The combination of circumstances found in the principal case is one not likely often to arise. There seems to be only one other decision on similar facts, and it was decided the same way.[4] The recent decision would, therefore, seem to settle the English law on this point.

P. V. R. M.

WASTE—RIGHT OF MORTGAGEE TO RESTRAIN THE MORTGAGOR IN POSSESSION.—There is a Delaware statute which gives the Chancellor power to restrain waste upon mortgaged premises upon petition of the mortgagee. In the case of Ennis v. Smith, et al.,[1] it appeared that the mortgagor had made a contract with a third party to fell and remove certain timber standing on the mortgaged premises. Part of the timber had already been felled, but was still on the mortgaged premises, when the mortgagee secured an injunction to restrain further cutting and to prevent the removal of what was already cut. The court, showing that the statute mentioned was merely an affirmance of a jurisdiction theretofore exercised by the Courts of Chancery, readily granted an order to restrain future cutting, but experienced considerable difficulty in determining whether the trees already felled might be removed or not. After apparent hesitation it granted an order, restraining the removal of the trees cut prior to the service of the preliminary decree, conditional upon the mortgagee's giving bond to indemnify the defendant if it should appear that they were correct in their contention that the order should not cover the removal of the trees already cut. It appeared in the case that the mortgagor was insolvent, though the other defendant was solvent. The mortgage was overdue by reason of the failure of the mortgagor to pay a part of the debt, and therefore the legal title to the premises was in the plaintiff.

A study of the authorities shows that the hesitancy of the Chancellor in extending the injunction to cover the removal of the timber already cut, was proper. The courts in all common law jurisdictions have uniformly granted injunctions upon prayer of the mortgagee to restrain future waste upon the mortgaged premises such as would materially impair the security.[2] Whether the mortgage is to be considered as passing the legal title[3] or as merely giving a lien for the debt,[4] seems not to have been considered by the courts in giving this remedy. In the case under discussion, however, the mortgage being over-due, the mortgages had an undoubted

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[4] Howcroft v. Laycock, 14 Times L. R. 460 (1898).

[1] 80 Atl. Rep. 636 (Del. 1911).

[2] King v. Smith, 2 Hare 239 (Eng. 1843); Delano v. Smith, 206 Mass. 365 (1910).

[3] Prudential Ins. Co. v. Guild, 64 Atl. Rep. 694 (N. J. 1906).

[4] Williams v. Chicago Exhibition Co., 188 Ill. 19 (1900).

legal title to the premises, even if the mortgage itself did not give him a legal estate. Having a legal estate in the premises, he had a complete and adequate remedy at law. He might have brought trespass for waste.[5] He also had an action of replevin for timber cut and removed,[6] inasmuch as it is a principle of the common law that property severed from the realty so as to become a chattel, belongs to the legal owner of the land—the mortgagee in the present case. Hence the mortgagee, having such interest in the land, and the actual and constructive possession, may maintain an action for the value of the property severed, or an action for specific chattels[7] either in the nature of a replevin[8] or trover.[9]

The court, in the principal case, cited in its opinion, Bank of Chenango v. Cox;[10] but that case should not have controlled the court because the courts of New Jersey take a unique view of the mortgagee's legal estate, and give him no legal remedy based upon the constructive right of possession which is in him.[11] The courts of other states have permitted the mortgagor to claim timber in the hands of a purchaser from the mortgagor.[12] In the case at bar the mortgagee's remedies at law were complete and adequate if the defendants persisted in their wrongdoing. It did not appear that both parties were insolvent even if that be an important factor in the case. Chancellor Kent declared the law on this subject in a case which involved a similar state of facts:[13] "It would seem then, to be a stretch of jurisdiction to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this court much beyond the remedy at law. * * * There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under shelter of it. I do not mean to be understood to say that the Court will never interfere; but that it ought not to be done in ordinary cases like this."

In view of the authorities cited it would appear that the injunction issued by the Delaware court should not have restrained the removal of the timber already cut. The extraordinary circumstances declared by Kent to be the foundation of the order do not appear in the case.

L. P. S.

[5] Stowell v. Pike, 2 Me. 387 (1823).
[6] Waterman v. Matteson, 4 R. I. 539 (1857).
[7] Johnson v. Bratton, 112 Mich. 319 (1897).
[8] Dorr v. Dudderar, 88 Ill. 107 (1878).
[9] Searle v. Sawyer, 127 Mass. 491 (1879).
[10] 26 N. J. Eq. 452 (1875).
[11] Kircher v. Schalk, 39 N. J. L. 335 (1877).
[12] Frothingham v. McKusick, 24 Me. 403 (1844).
[13] Watson v. Hunter, 5 Johns. Ch. 169 (1821).